Supreme Court U. S.
FILED
OCT 16 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1975

No. 75-575 1

JOSEPH KLEIN and AUDREY MARTIN MACFADDEN,
Petitoners,

vs.

CITY OF MENLO PARK and ELIZABETH K.
JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PAUL K. ROBERTSON, ESQ.
ROBERTSON & HAND
459 Hamilton Avenue
Palo Alto, CA 94301
Phone: (415) 328-7450
ATTORNEYS FOR PETITIONERS.

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement of the case	3
Facts	3
Presentation of federal question in state courts	6
Reason for granting the writ	7
Conclusion	15

TABLE OF AUTHORTIES CITED

Cases

	Pages
Boddie v. Connecticut, 401 U.S. 371 (1971)	10
City of New York v. N.Y., N.H. and H.R. Co., 344 U.S. 293 (1953)	10
Covey v. Town of Somers, 351 U.S. 141 (1955)	10
Grannis v. Ordean, 234 U.S. 385, 394 (1914)	11
Groppi v. Leslie, 404 U.S. 496 at 503 (1971)	10
Hess v. Pawloski, 274 U.S. 352 (1927)	12
Johnson v. Claremont, 40 Cal.2d 826 (1958)	9
Mullane v. Central Hanover Co., 339 U.S. 306 (1950)	10,11
Scott v. City of Indian Wells, 6 Cal.3d 541 (1972)	7
Walker v. Hutchinson City, 352 U.S. 112 (1956)	10
Wuchter v. Pizzutti, 276 U.S. 13 (1926)	12

Codes

California Elections Code:	
Section 4050	9,10
Section 4057	9
California Government Code:	
Section 54773	8
Section 54774	4,5
Section 65854	7,9
Section 68859	3
Menlo Park City Ordinance, Ch. 16.84	5,9

TABLE OF AUTHORITIES CITED
(continued)

Statutes

	Pages
United States Constitution Fourteenth Amendment.....	2
28 U.S.C. §1257(3).....	2

IN THE SUPREME COURT

Of The

UNITED STATES

October Term, 1975

No.

JOSEPH KLEIN and AUDREY MARTIN MACFADDEN,
Petitioners,

VS.

CITY OF MENLO PARK and ELIZABETH K. JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in this proceeding on June 5, 1975. (Hearing denied in the California Supreme Court on August 1, 1975.)

OPINIONS BELOW

The original opinion and the opinion on rehearing of the Court of Appeal of the State of California (not reported) appear

in the appendix hereto. The Supreme Court of the State of California denied petitioners a hearing without opinion.

JURISDICTION

The California Court of Appeal's judgment was entered on June 5, 1975. The Court of Appeal denied a timely petition for a second rehearing on June 20, 1975. A timely petition for hearing in the California Supreme Court was denied without opinion on August 1, 1975. This Court's jurisdiction is invoked under 28 United States Code §1257(3).

QUESTION PRESENTED

Whether constructive notice by newspaper publication satisfies due process of law under the 14th Amendment to the United States Constitution where a city government rezones land and the rezoning materially affects the property rights of contiguous and nearby property-owner residents.

STATEMENT OF THE CASE

FACTS

On the application of respondent Johnson, the City of Menlo Park enacted an ordinance changing the zoning of a parcel of real property situated in San Mateo County from single-family residential (10,000 sq. ft. per unit, four units per acre) to a retirement living district (800 sq. ft. per unit, 50 units per acre). (Clerk's Transcript [hereinafter C.T.] p. 31.) The zoning was accomplished pursuant to California's pre-zoning statute which permits a City considering annexing a parcel of County property to "pre-zone" it. California Government Code §68859. Petitioners reside upon and own real property situated within 300 feet of the subject parcel but situated in San Mateo County along the gerrymandered boundary between the City of Menlo Park and the County. (C.T. p. 1-2.) Petitioner MacFadden resides upon and owns property contiguous to the subject parcel. The only notice of the hearings was one published once in a free weekly newspaper circulated within the City of Menlo Park and another adjacent city, Atherton. (C.T. p. 2-3, 126.) Hearings were held before the City Planning Commission (of which

Johnson's architect was an active member) and the City Council. (C.T. p. 2-3.) The ordinance was passed on August 8, 1972. (C.T. p. 3.) Eight months later on March 3, 1973 petitioners gained their first actual knowledge of the proceedings. (C.T. p. 126 and plaintiffs' Exhibit No. 3 in the Trial Court.)

On February 21, 1973 the Local Agency Formation Commission (LAFCO) for San Mateo County approved an application of respondent Johnson for annexation of the subject property to the City of Menlo Park. (C.T. p. 120-121.) At that time the Commission was unaware that the City of Menlo Park had taken advantage of California's prezoning statutes and rezoned the property for a high density retirement center. Nor did the Commission know the Johnson Trust proposed to build a 161-unit retirement center. The Commission thought that the single-family residential zoning was in force and determined that such was consistent with the general plans of San Mateo County and Menlo Park. (C.T. p. 120-121.)

Among the powers and purposes of LAFCO is the discouragement of urban sprawl. California Government Code §54774. LAFCO's approval is required for annexation of

county land to a city. California Government Code §54774.

On March 5, 1973 the Menlo Park Planning Commission held an administrative hearing and granted a use permit to construct 161 retirement units on the four-acre parcel. (C.T. p. 2-3, 126.) Petitioners accidentally learned of this hearing and appeared and argued against the issuance of a use permit. (C.T. p. 18.)

Petitioner Klein timely appealed the granting of the use permit to the Menlo Park City Council. (C.T. p. 41-42.) Notice of the public hearing on Klein's appeal was published and mailed to all owners of property within 300 feet of the subject parcel. (C.T. p. 104-105, 190, plaintiff's Exhibit No. 1 in the Trial Court.) The City Council by vote of three to two denied the appeal. (C.T. p. 189-191.)

Menlo Park City Ordinances Chapter 16.84 require that notice of zoning and use permit hearings be mailed to owners (as their names appear on the County Tax Assessor Records) of property within 300 feet of the subject property. It was stipulated in the trial court that except for Klein's appeal no notice by mail was given to any owners of real property outside the City

of Menlo Park, including petitioners (C.T. p. 126), and that the names and addresses of persons owning land in the County within 300 feet of the subject parcel were at all times readily available to the City of Menlo Park. (C.T. p. 127.)

PRESENTATION OF FEDERAL QUESTION IN STATE COURTS

The question presented was first raised before the Superior Court of the State of California in and for the County of San Mateo by petition for writ of mandamus. Thereafter petitioners raised the question in their timely appeal before the Court of Appeal of the State of California, First Appellate District, Division Four. The Court of Appeal affirmed on the grounds that the record on appeal was inadequate. The Court of Appeal then granted a rehearing and filed a new judgment and opinion holding on the merits that petitioners were not prejudiced by the lack of notice. Petitioners timely sought a second rehearing which was denied without opinion. Petitioners then timely sought a hearing in the Supreme Court of the State of California, which was denied without opinion on August 1, 1975.

REASONS FOR GRANTING THE WRIT

Today the issue presented in this case is of exceptional importance to the public. Every day thousands of municipalities hold so-called "public" hearings and there make rezoning decisions which affect the rights of nearby property owners. Most of these "public" hearings are preceded only by constructive notice by publication. Where notice by mail is given it is often confined (as in this case) to property owners within the city limits so that a nextdoor neighbor who lives across a gerrymandered city-county boundary receives no notice unless he is diligent enough to peruse the inner recesses of all the newspapers circulated within the city. See *SCOTT v. CITY OF INDIAN WELLS*, 6 Cal.3d 541 (1972). Even if a citizen is lucky or astute enough to read such a notice, California law gives him only ten days to prepare and present his objections to a plan which the developer and city planning officials have been preparing for months. California Government Code §65854. In an area such as the San Francisco Bay Area (and probably hundreds of other urban areas) there are dozens of contiguous cities and probably thousands of miles of such artificial,

zig-zagging boundaries. In response to this situation and to discourage urban sprawl, the California Legislature in 1965 enacted §§54773, *et seq.* of the Government Code creating LAFCO. LAFCO must hold public hearings and give notice to affected parties unless it is considering an annexation where all of the owners of the land to be annexed have consented. Rights of adjacent landowners to notice are not recognized.

The collapse of inner cities from the strangulation that accompanies rapid and ill-considered densification of population is spreading to the suburbs. If the democratic process is to work in this legislative area of zoning at local and regional levels, contiguous and nearby residents whose property rights are affected by such decisions must be afforded the opportunity to air their views before legislative action is taken. No body of modern environmental law can be complete without a guarantee of such an opportunity to be heard.

The instant case offers the Court an effective vehicle for dealing with this issue. Here we have a dramatic change from single-family dwellings to a high

density commercial retirement development in a single-family residential neighborhood. Here the developer and City planning officials (one of whom was the developer's architect) met in study sessions months before the zoning application was brought before the City Council. (See Planning Commission Staff Report and Environmental Impact Report contained in defendants' Exhibits B and C in the Trial Court.) Two of the ten-day notices by publication required by the California Government Code §65854 were given late. (C.T. pp. 2 and 3.) The City failed to comply with its own ordinance (Ch. 16.84) requiring notice by mail to owners of property within 300 feet of the development. (C.T. pp. 126-127.) LAFCO approved annexation without any notice to anyone and without knowing that the property's zoning had been changed by pre-zoning. (C.T. pp. 120-121.) In California zoning is a legislative action subject to referendum. California Elections Code §§4050 to 4057; *JOHNSON v. CLAREMONT,* 40 Cal.2d 826 (1958). By the time petitioners learned of the ordinance, eight months after its passage (C.T. p. 126), the referendum period had elapsed.

True, petitioners attended administrative hearings on the use permit eights months after the zoning ordinance was passed. But such administrative proceedings are not subject to referendum. California Elections Code §4050 *et seq.* Even if the City had denied the developer's application for a use permit the zoning ordinance would stand, and later similar applications for use permits could be granted.

Petitioners presented uncontroverted evidence to the trial court that, had they been heard at the zoning stage, the result may well have been different. (C.T. pp. 15, 114, 116, 118, 120.) Certainly petitioners could have sought a referendum to place the matter on a ballot had they known of the zoning ordinance in time.

There are numerous precedents from this Court to guide it in resolving this matter. *MULLANE v CENTRAL HANOVER CO.*, 339 U.S. 306 (1950); *GROPPI v. LESLIE*, 404 U.S. 496 at 503 (1971); *COVEY v. TOWN OF SOMERS*, 351 U.S. 141 (1955); *CITY OF NEW YORK v. N.Y., N.H. and H.R. CO.*, 344 U.S. 293 (1953); *WALKER v. HUTCHINSON CITY*, 352 U.S. 112 (1956); *BODDIE v. CONNECTICUT*, 401 U.S. 371 (1971).

As to the merits of the question whether

constructive notice by publication is sufficient to satisfy due process in this legislative situation, petitioners quote from *MULLANE v. CENTRAL HANOVER CO.*, 339 U.S. 306 (1950):

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.
>
> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *GRANNIS v. ORDEAN*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> "The court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determing when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary to nonresidents. We disturb none of the

established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations] The notice must be of such nature as reasonably to convey the required information, [citation], and it must afford a reasonable time for those interested to make their appearance, [citations]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possiblity of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' [Citations]

"But when notice is a person's due process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *HESS v. PAWLOSKI*, 274 U.S. 352, with *WUCHTER v. PIZZUTTI*, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible

and customary substitutes.

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." At page 313-315.

"This court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their righrs. [Citations]

"Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best

notice practicable.

"Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee.... We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process." At page 317-318.

"As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." At page 318.

"The statutory notice to known beneficiaries is inadequate, not becuase in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund

was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' [Citation]"

CONCLUSION

Petitioners respectfully submit that the Court should grant a writ of certiorari to the California Court of Appeal.

Dated: October 3, 1975

ROBERTSON & HAND
PAUL K. ROBERTSON, ESQ.
Attorneys for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

DO NOT PUBLISH

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION FOUR

JOSEPH KLEIN, et al., Plaintiffs-Appellants, vs. CITY COUNCIL OF MENLO PARK, et al., Defendants-Respondents, ELIZABETH K. JOHNSON, Trustee, Real Party in Interest and Respondent.	1 Civil No. 33847 (Sup.Ct.No.174919)

[Filed March 4, 1975]

BY THE COURT:*

Appellants argue that the "sole issue presented in this appeal is whether the City denied appellants due process of law by failing to give appellants notice in a form reasonably calculated under all the circumstances to apprise them of the pendency of the pre-zoning and use permit hearings and afford them the opportunity to appear and present their objections.

* Before Caldecott, P.M., Rattigan, J., and Christian, J.

In pertinent part the trial court found that as a matter of law "the proceedings conducted by the City of Menlo Park in connection with the prezoning of the property were completed without prejudice to any of petitioners herein." The court further found that "the proceedings conducted by the City of Menlo Park in connection with the granting of the use permit were completed without prejudice to any of the petitioners herein as the term prejudice is employed by Section 65801 of the Government Code and Section 1094.5 of the Code of Civil Procedure."

Since this appeal is taken on the Clerk's Transcript alone, it is conclusively presumed that the evidence before the trial court was sufficient to support the findings. (Winkelman v. City of Tiburon (1973) 32 Cal.App.3d 834, 841; Millbrae Assn. for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222,226.) Where an appeal is taken from a Clerk's Transcript alone, the "sufficiency of the evidence to support the findings is not open to review." (Wheelright v. County of Marin (1970) 2 Cal.3d 448, 454.)

Thus, the lower court's finding that the proceedings conducted by the City of Menlo

Park in connection with rezoning the property of real party in interest and granting a use permit, were without prejudice to appellants and not in violation of Government Code section 65801, is not subject to attack in this appeal on the Clerk's Transcript alone.

Furthermore, as respondents point out, the 10-day notice requirement of Government Code section 65801 is not absolute. It is not "constitutionally required to provide for notice of 10 days' duration; section 65801, imposing a test of prejudice as the basis of invalidating a zoning ordinance for 'irregularity' in 'notices,' has in effect substituted the adequacy of notice in fact, as distinguished from its formulary duration, as the test of its adequacy for purposes of due process." (City of Sausalito v. County of Marin (1970) 12 Cal.App.3d 550, 559.)

The trial court thus concluded that "the failure to publish notice ten days prior to the Planning Commission hearing was not prejudicial...." Since appellants "were actually present at the hearing...the actual notice that was imparted...overcomes any inference of prejudice...."(Ibid.)

Finally, appellants' reliance on Scott v.

City of Indian Wells (1972) 6 Cal.3d 541, 546, is misplaced. In Scott the affected landowners had no opportunity to present evidence of their claims as the matter was decided by demurrer. The Supreme Court thus remanded the case for consideration of all the fact. In the present case, the appellants have had opportunity to present their claims before the city council, planning commission and trial court.

Accordingly, since appellants have not been denied due process the decision of the trial court should be affirmed.

The judgment is affirmed.

Appendix B

DO NOT PUBLISH

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION FOUR

JOSEPH KLEIN, et al., Plaintiffs-Appellants, vs. CITY COUNCIL OF MENLO PARK, et al., Defendants-Respondents, ELIZABETH K. JOHNSON, Trustee, Real Party in Interest and Respondent.	1 Civil No. 33847 (Sup.Ct.No.174919)

[Filed June 5, 1975]

BY THE COURT:*

Appellants argue that the "sole issue presented in this appeal is whether the City denied appellants due process of law by failing to give appellants notice in a form reasonably calculated under all the circumstances to apprise them of the pendency of the pre-zoning and use permit hearings and afford them the opportunity to appear and present their objections.

In pertinent part the trial court found

* Before Caldecott, P.J., Rattigan, J., and Christian, J.

that as a matter of law "the proceedings conducted by the City of Menlo Park in connection with the prezoning of the property were completed without prejudice to any of petitioners herein." The court further found that "the proceedings conducted by the City of Menlo Park in connection with the granting of the use permit were completed without prejudice to any of the petitioners herein as the term prejudice is employed by Section 65801 of the Government Code and Section 1094.5 of the Code of Civil Procedure." There is evidence to support these findings in the Staff Report of the Planning Department whose recommendation was adopted by the planning commission.

The 10-day notice requirement of Government Code section 65801 is not absolute. It is not "constitutionally required to provide for notice of 10 days' duration; section 65801, imposing a test of prejudice as the basis of invalidating a zoning ordinance for 'irregularity' in 'notices,' has in effect substituted the adequacy of notice in fact, as distinguished from its formulary duration, as the test of its adequacy for purposes of due process." (City of Sausalito v. County of Marin

(1970) 12 Cal.App.3d 550,559.)

The trial court thus concluded that "the failure to publish notice ten days prior to the Planning Commission hearing was not prejudicial. . . ." Since appellants "were actually present at the hearing . . . the actual notice that was imparted . . . overcomes any inference of prejudice. . . ." (Ibid.)

Appellants' reliance on Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 546, is misplaced. In Scott, the affected landowners had not opportunity to present evidence of thier claims as the matter was decided by demurrer. The Supreme Court thus remanded the case for consideration of all the facts. In the present case, the appellants have had opportunity to present their claims before the city council, planing commission and trial court.

Accordingly, since appellants have not been denied due process the decision of the trial court should be affirmed.

The judgment is affirmed.